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SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES

(The Status of Executive Order 10501)

TWENTY-FIFTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

SEPTEMBER 21, 1962.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., September 21, 1962.

Hon. JOHN MCCORMACK,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's twenty-fifth report to the 87th Congress. The committee's report is based on a study made by its Special Government Information Subcommittee.

WILLIAM L. DAWSON, *Chairman.*

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(The Status of Executive Order 10501)

SEPTEMBER 21, 1962.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. DAWSON, from the Committee on Government Operations, submitted the following

TWENTY-FIFTH REPORT

BASED ON A STUDY BY THE SPECIAL GOVERNMENT INFORMATION SUBCOMMITTEE

On September 19, 1962, the Committee on Government Operations had before it for consideration a report entitled "Safeguarding Official Information in the Interests of the Defense of the United States (The Status of Executive Order 10501)." Upon motion made and seconded, the report was approved and adopted as the report of the full committee. The chairman was directed to transmit a copy to the Speaker of the House.

I. SCOPE AND BACKGROUND

For more than 7 years the Special Subcommittee on Government Information of the House Committee on Government Operations has studied the problems involved in maintaining the public's right of access to Government information without at the same time compromising critical defense secrets vital to the security of the United States.

The subcommittee was chartered by Hon. William L. Dawson, chairman of the House Committee on Government Operations, on June 9, 1955. In his letter authorizing the creation of the subcommittee, Chairman Dawson stated that—

> An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary

information on governmental activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.

This current study is concerned with the procedures under which the Federal Government imposes necessary restrictions on the availability of sensitive defense information in the face of the democratic ideal that the public has a right and a need to know the facts of government. These considerations are embodied in Executive Order 10501 (18 F.R. 7049) and its amendments. The order, entitled "Safeguarding Official Information in the Interests of the Defense of the United States," was issued on November 5, 1953. After a careful study of the use of the new order, the House Government Operations Committee concluded that it embodied a "negative" approach by giving blanket authority to hundreds of agencies—an accurate number never could be determined—to classify information as important to the Nation's security and to withhold it from the public. A small number of agencies were denied classification authority by the original order. The result was that every agency not on the small excepted list, including such agencies as the Migratory Bird Conservation Commission and the Indian Arts and Crafts Board, had full authority to classify all of their documents as military secrets (H. Rept. 2084, 86th Cong., pp. 164–176).

On several occasions the committee recommended that a "positive" approach be incorporated into Executive Order 10501 by publishing a new order listing only those specific agencies which really need authority to classify and withhold military security information. This was accomplished when Executive Order 10901 (26 F.R. 217) was signed on January 9, 1961, and the background on this development is covered fully in House Report 818, 87th Congress, pages 139–154.

During the years of study of the system for protecting military security information, a number of other improvements had been recommended by the committee, and nearly all of these changes have been made since January, 1961. This report brings up to date the changes in the system for controlling access to sensitive information. It includes an amended version of Executive Order 10501 incorporating all of the changes made since the order was issued (app. I). Also included are a special study of provisions for enforcing the Executive order (sec. III and apps. II, and III), an analysis of provisions for appeals against abuse of the classification system (sec. IV), and a detailed chronology of the changes in Executive Order 10501 (sec. V).

II. THE AUTOMATIC DOWNGRADING AND DECLASSIFICATION SYSTEM—EXECUTIVE ORDER 10964

The most recent improvement in the information protection system occurred on September 20, 1961, when President John F. Kennedy issued Executive Order 10964 (26 F.R. 8932) which applied the Defense Department's automatic declassification and downgrading system to all Government agencies.

Such a system had been recommended repeatedly by the committee. In its report of July 1956 the committee warned that declassification procedures under Executive Order 10501 were being almost totally ignored and that a huge backlog of classified material was piling up (H. Rept. 2947, 84th Cong., p. 89). In 1958 the committee recommended that the President should make mandatory the marking of each classified document with the future date or event after which it will be reviewed or automatically downgraded or declassified (H. Rept. 1884, 85th Cong., p. 161). The committee pointed out the urgency for some adequate declassification system in subsequent reports (H. Rept. 2578, 85th Cong., p. 217; H. Rept. 818, 87th Cong., p. 17; H. Rept. 1257, 87th Cong., p. 15).

The first tangible response to the committee's repeated recommendations on a downgrading and declassification system was Department of Defense Directive 5200.9, published on September 27, 1958. This order was limited to documents which originated prior to January 1, 1946, and the committee said it was "a significant first step" toward a solution of the problems of classification and declassification (H. Rept. 1137, 86th Cong., pp. 79–104).

The second major improvement in the classification system was Department of Defense Directive 5200.10 which applied the automatic downgrading and declassification system to documents originated on or after January 1, 1946, and to documents originated in the future (H. Rept. 818, 87th Cong., p. 17). This directive became effective on May 1, 1961.

The new Executive Order 10964, which is patterned almost exactly after DOD Directive 5200.10, creates four classes of military-security documents. The first group contains information originated by foreign governments, restricted by statutes, or requiring special handling. This type of material is excluded from the automatic system. The second group contains extremely sensitive documents which are to be downgraded or declassified on an individual basis. The third group contains information which warrants some degree of classification for an indefinite period and would be downgraded at 12-year intervals until the lowest classification is reached, but would not be automatically declassified. All other information, which comprises the great bulk of classified documents, falls into the fourth group and is downgraded automatically at 3-year intervals until the lowest classification is reached; in 12 years, this material is to be automatically declassified.

Other changes accomplished by Executive Order 10964 include—

1. All classified material is to be marked at the time of origination to indicate the new downgrading-declassification schedule.
2. The use of armed guards is no longer necessary where classified information is stored under continuous surveillance.
3. Fireproof safes and containers are no longer required since destruction by burning would not result in a compromise of classified information.
4. Transmission of classified documents is simplified by a number of technical improvements.

As a result of the changes in the system for protecting security information there will be an estimated savings in Government costs of $1 million a year. (See app. IV.)

III. ENFORCING THE REGULATIONS UNDER THE INFORMATION SECURITY SYSTEM

Executive Order 10964 added a section directing department heads to "take prompt and stringent administrative action" against Government personnel who knowingly and improperly release classified information. Where appropriate, these cases are to be referred to the Department of Justice for possible prosecution. Section 19 of Executive Order 10501 states:

> *Unauthorized Disclosure by Government Personnel:* The head of each department and agency is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been knowingly responsible for any release or disclosure of classified defense information or material except in the manner authorized by this order, and where a violation of criminal statutes may be involved, to refer promptly to the Department of Justice any such case.

There is no such provision in the Executive order which applies to dissemination of classified information by the press or any non-Government individual.

It does not necessarily follow that this lack gives private groups or individuals complete immunity to publish material classified under the Executive order, for such action would be affected by statutes commonly referred to as the Espionage Act. One statute (18 U.S.C. 798) provides a maximum penalty of a $10,000 fine and 10 years' imprisonment for willfully publishing—

> in any manner prejudicial to the safety or interest of the United States * * * any classified information * * * concerning the communication intelligence activities of the United States * * * or obtained by the processes of communication intelligence from the communications of any foreign government * * *.

The statute defines "communication intelligence" as procedures and methods used in intercepting communications and the obtaining of information from any source other than the intended recipients.

Another section of the Espionage Act is of more general application; 18 U.S.C. 793(e) provides:

> Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the

> advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section has the effect of subjecting to prosecution anyone who willfully discloses information relating to the national defense. Under this provision, a jury trial would be necessary to determine the factual question of the relevance of the information to the national defense. In addition, it would be necessary to prove the *mens rea*—the evil intent—of the disseminator.

The question of penalties for compromising information classified under Executive Order 10501 involves the question of authority for the issuance of Presidential orders restricting official information in the interests of the defense of the United States. There have been a number of past studies of the authority for issuing such orders. The first was done for the former Senate Committee on Expenditures in the Executive Departments in 1951. (See app. II.) It analyzed President Truman's Executive Order 10290 (16 F.R. 9795) which was the antecedent for President Eisenhower's Executive Order 10501 and was the first Government-wide system for control of security information. The most recent study was in November 1960, when the Legislative Reference Service analyzed the authority for promulgation of Executive Order 10501 and was asked, as an example, whether any law was violated by a newspaper which allegedly published information restricted by the order. (See app. III.)

The 1951 study concludes that the first Government-wide order classifying security information (Executive Order 10290) was issued under the President's constitutional power to make sure that the laws are faithfully executed. The laws in this case are the sections of the Federal Criminal Code safeguarding internal security and prohibiting espionage.

The 1960 study arrives at the same conclusion: there is no statutory basis for Executive Order 10501. Other Executive orders, the study points out, specifically cite statutory authority. Executive orders controlling security information (and this applies to the two amendments to Executive Order 10501 which President Kennedy has issued) cite as authority the powers vested in the President "by the Constitution and statutes * * *."

This study also cites at length the comments of the acknowledged expert in the field. The late Dr. Harold L. Cross, in his book "The People's Right To Know," concludes that authority for Executive Order 10501 stems almost solely from the section of the Constitution vesting the "executive power" in the President and from the "take care" clause. (See app. III.)

IV. APPEALS AGAINST ABUSE OF THE CLASSIFICATION SYSTEM

The withholding of government information in a democratic society is more palatable if there is an effective procedure to appeal against abuses of the withholding system. This was recognized in section 16 of Executive Order 10501, which provides:

> *Review to Insure That Information Is Not Improperly Withheld Hereunder:* The President shall designate a member of his staff who shall receive, consider, and take action upon, suggestions or complaints from non-Governmental sources relating to the operation of this order.

Testimony before the subcommittee, as well as documents submitted in evidence, established the fact that this section of the Executive order was either ineffective or virtually ignored during the previous administration. In the first 3 years of operation under the order only five complaints were handled by the White House staff member designated by the President. None of his actions resulted in the release of any information. Subsequently the entire function atrophied through lack of confidence in its effectiveness and consequent disuse.

In the light of the evidence, the committee recommended that:

> 1. The President should make effective the classification appeals procedure under section 16 of Executive Order 10501 and provide for a realistic, independent appraisal of complaints against overclassification and unjustified withholding of information (H. Rept. 1884, 85th Cong., p. 161).

No action was taken on this matter despite committee reiteration of its recommendation and frequent subcommittee suggestions. With the change in administrations, the subcommittee on February 23, 1961, advised President Kennedy of the committee's recommendation and urged him to put it into effect (H. Rept. 1257, 87th Cong., p. 153). Subsequently the subcommittee was advised that the National Security Council was taking the recommendation under consideration in its continuing review of operations under the order aimed at insuring "that classified defense information is properly guarded" and "that information which does not require protection in the interest of national security will be made available to the public" (H. Rept. 1257, 87th Cong., p. 154).

After informal inquiries indicated that little or nothing was being done to deal with the committee's recommendation on section 16, the subcommittee addressed the following letter to the President:

SPECIAL GOVERNMENT INFORMATION
SUBCOMMITTEE OF THE COMMITTEE ON
GOVERNMENT OPERATIONS,
Washington, D.C., September 6, 1962.

Hon. JOHN F. KENNEDY,
The President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: A letter to you dated February 23, 1961, outlined some of the problems that the Special Subcommittee on Government Information had encountered in studying the availability of Government information. The letter pointed out that the previous administration had failed to act upon one of the more important recommendations of the House Government Operations Committee. That recommendation was:

"The President should make effective the classification appeals procedure under section 16 of Executive Order 10501 and provide for a realistic, independent appraisal of complaints against overclassification and unjustified withholding of information" (H. Rept. 1884, 85th Cong., p. 161).

As you know, section 16 of Executive Order 10501 provides the only avenue for appeal by nongovernment officials against mishandling of classified information. It reads:

"The President shall designate a member of his staff who shall receive, consider, and take action upon, suggestions or complaints from nongovernmental sources relating to the operation of this order" (18 F.R. 7049).

The subcommittee is preparing its second report on availability of information under your administration. Please provide, for the report, the name of the staff member designated under section 16. How many complaints have been received under this section? What was their disposition?

Sincerely,

JOHN E. MOSS, *Chairman.*

The response from Assistant Special Counsel Lee C. White indicated that although a staff member had been designated to receive the complaints, the system was apparently enjoying the same desuetude it experienced in the previous administration. His letter follows:

THE WHITE HOUSE,
Washington, September 12, 1962.

Hon. JOHN E. MOSS,
Chairman, Special Subcommittee on Government Information,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: The President has asked me to reply to your letter of September 6 concerning implementation of section 16 of Executive Order 10501.

That section provides for designation of a member of the President's staff to take action on suggestions or complaints

from nongovernmental sources about problems arising under the order. I have been designated to handle this duty.

Although no formal complaints have been filed under section 16, I can assure you that any such complaints that may be received will be handled as expeditiously and fairly as possible.

Sincerely,

LEE C. WHITE,
Assistant Special Counsel to the President.

Another solution to the problem of overclassification and unjustified withholding of information was recommended by the committee on page 161 of House Report 1884 (84th Cong.):

> The Secretary of Defense should direct that disciplinary action be taken in cases of overclassification.

This recommendation was based on a number of hearings and on expert testimony that a few, well-chosen secrets should be vigorously protected rather than having a security system jammed with unimportant, outdated material that in reality no longer merited the protection of secrecy.

With the change of administrations the subcommittee took the opportunity to apprise the Secretary of Defense of the committee's recommendation that overclassification be penalized. The response, although expressing interest in the committee's position, did not specifically deal with the problems raised (H. Rept. 1257, 87th Cong., p. 55). Nevertheless Secretary of Defense McNamara made clear his agreement with the principle involved. A new directive was promulgated stating four principles of information policy, among which was the following:

> Secondly, it is essential to avoid disclosure of information that can be of material assistance to our potential enemies, and thereby weaken our defense position. It is equally important to avoid overclassification, and, therefore, I suggest that we follow this principle: When in doubt, underclassify * * * (H. Rept. 1257, 87th Cong., p. 57).

Neither this directive nor subsequent Pentagon orders, however, backed up the "when in doubt, underclassify" philosophy by providing a penalty for overclassification as had been recommended by the committee.

V. CHRONOLOGY OF EXECUTIVE ORDER 10501

I. *Executive Order 10501* (18 F.R. 7049), issued November 5, 1953 (effective date, December 15, 1953), entitled "Safeguarding Official Information in the Interests of the Defense of the United States." This replaced Executive Order 10290 issued to control military information on September 24, 1951. Executive Order 10501 was the basic classification order under the Eisenhower administration and remains in force, as amended, under the Kennedy administration.

II. *Memorandum to Executive Order 10501* (24 F.R. 3779) dated November 5, 1953, specified 28 agencies without original classification authority and 17 agencies in which classification authority is limited to the head of the agency.

III. *Executive Order 10816* (24 F.R. 3777), issued May 7, 1959. This order accomplished the following:

A. Under Executive Order 10290 (September 24, 1951) all Government agencies had authority to classify information. Executive Order 10501 canceled this authorization for those agencies "having no direct responsibility for national defense," but was silent on the problem of declassifying any information which agencies with no direct defense responsibility had classified previously. The new order clarified the hiatus which had existed.

B. Under section 7 of Executive Order 10501 only persons whose official duties were in the interest of "promoting national defense" had access to classified information. It was discovered that this excluded persons who wished to examine documents while carrying out bona fide historical research. The new order allowed access to classified information to trustworthy persons engaged in such research projects, provided access was "clearly consistent with the interests of national defense."

C. The new order allowed the transmission of "confidential" defense material within the United States by certified and first-class mail, in addition to the original authorization to use registered mail.

IV. *Memorandum to Executive Order 10501* (24 F.R. 3777), dated May 7, 1959, added 2 agencies to the 28 agencies previously designated by the President as having no authority to classify information under Executive Order 10501.

V. *Memorandum to Executive Order 10501* (25 F.R. 2073), dated March 9, 1960, provided that agencies created after November 5, 1953 (date of issuance of Executive Order 10501), shall not have authority to classify information under the Executive order unless specifically authorized to do so. In addition, the memorandum listed eight such agencies which were granted authority to classify defense material.

VI. *Executive Order 10901* (26 F.R. 217), dated January 9, 1961, adopted a "positive" approach to the authority to control national defense information. Prior to this revision, all Government agencies except those specifically listed, could stamp "Top secret," "Secret,"

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or "Confidential" on the information they originated. Executive Order 10901 superseded previous authority and listed by name those agencies granted authority to classify security information. The order lists 32 agencies which have blanket authority to originate classified material because they have "primary responsibility for matters pertaining to national defense," and the authority can be delegated by the agency head as he wishes. The order lists 13 agencies in which the authority to originate classified information can be exercised only by the head of agencies which have "partial but not primary responsibility for matters pertaining to national defense." The order states that Government agencies established after the issuance of Executive Order 10901 do not have authority to classify information unless such authority is specifically granted by the President.

VII. *Executive Order 10964* (26 F.R. 8932), dated September 20, 1961, set up an automatic declassification and downgrading system. The four classes of military-security documents created are—

(1) Information originated by foreign governments, restricted by statutes, or requiring special handling, which is excluded from the automatic system;

(2) Extremely sensitive information placed in a special class and downgraded or declassified on an individual basis;

(3) Information or material which warrant some degree of classification for an indefinite period and will be downgraded automatically at 12-year intervals until the lowest classification is reached; and

(4) All other information which is automatically downgraded every 3 years until the lowest classification is reached and the material is automatically declassified after 12 years.

The order requires that, to the fullest extent possible, the classifying authority shall indicate the group the material falls into at the time of originating the classification.

VIII. *Executive Order 10985* (27 F.R. 439), dated January 12, 1962, removes from certain agencies the power to classify information, and adds other agencies to the list of those with the authority to classify.

VI. FINDINGS AND CONCLUSIONS

Over the years, as the House Government Operations Committee has recommended changes in Executive Order 10501, there has been significant progress toward resolution of the conflict between the necessity for a fully informed public in a democratic society and the importance of protecting defense information to help preserve that society. There has been a gradual recognition of the fact that the ideal information security system is one which defines very carefully those secrets which are imperative to the Nation's defense and then protects them as carefully as possible. Thus, Executive Order 10501 has evolved from a sort of catchall system permitting scores of Government agencies and more than a million Government employees to stamp permanent security designations on all kinds of documents, to a system permitting only those officials directly involved in security problems to place on limited numbers of documents security classifications which are to be removed with the passage of time.

But two of the most important security problems which the committee has discussed over the years still remain to be solved. There are strict penalties for failure to protect a document which may have an effect upon the Nation's security, but there are no penalties for those secrecy minded Government officials who abuse the classification system by withholding, in the name of security, all sorts of administrative documents. A security system which carries no penalties for using secrecy stamps to hide errors in judgment, waste, inefficiency, or worse, is a perversion of true security. The praiseworthy slogan of Defense Secretary McNamara—"when in doubt, underclassify"—has little effect when there is absolutely no penalty to prevent secrecy from being used to insure individual job security rather than national military security.

The Committee strongly urges, therefore, that the Defense Department establish administrative penalties for misuse of the security system, for until the generalizations about the public's right to know are backed up by specific rules and regulations—until set penalties are established for abuse of the classification system—fine promises and friendly phrases cannot dispel the fear that information which has no effect on the Nation's security is being hidden by secrecy stamps.

The other problem, which seems to be no nearer solution today than when it was first posed by the committee (H. Rept. 1884, 85th Cong., p. 161), is the lack of an effective procedure for appeals against abuse of the information classification system. President Kennedy assigned the appeals job to his Assistant Special Counsel, but the incidental assignment to a busy assistant of responsibility for the appeals procedure along with his many other duties does not fill the need for an effective system to handle public appeals against secrecy abuses.

The Committee strongly urges, therefore, that the appeals section of Executive Order 10501 be adequately implemented in an effective manner, for until a responsible individual in the White House is charged with the primary duty of receiving and acting upon complaints against abuse of the classification system—until a fully operating appeals system is set up and widely publicized—the most important safety valve in the information security system is completely useless.

APPENDIXES

Appendix I. Current Version of Executive Order 10501

EXECUTIVE ORDER No. 10501 [1]

SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES

Whereas it is essential that the citizens of the United States be informed concerning the activities of their government; and

Whereas the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

Whereas it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure;

Now, therefore, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. *Classification Categories:* Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

(a) *Top Secret:* Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) *Secret:* Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized

[1] As amended by Executive Order No. 10816, May 7, 1959; Executive Order No. 10901, Jan. 9, 1961; Executive Order No. 10964, Sept. 20, 1961; and Executive Order No. 10985, Jan. 12, 1962.

disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national defense, or information revealing important intelligence operations.

(c) *Confidential:* Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

SECTION 2. *Limitation of authority to classify:* The authority to classify defense information or material under this order shall be limited in the departments, agencies, and other units of the executive branch as hereinafter specified.

(a) In the following departments, agencies, and Governmental units, having primary responsibility for matters pertaining to national defense, the authority for original classification of information or material under this order may be exercised by the head of the department, agency, or Governmental unit concerned or by such responsible officers or employees as he, or his representative, may designate for that purpose. The delegation of such authority to clasify shall be limited as severely as is consistent with the orderly and expeditious transaction of Government business.

The White House Office
President's Science Advisory Committee
Bureau of the Budget
Council of Economic Advisers
National Security Council
Central Intelligence Agency
Department of State
Department of the Treasury
Department of Defense
Department of the Army
Department of the Navy
Department of the Air Force
Department of Justice
Department of Commerce
Department of Labor
Atomic Energy Commission
Canal Zone Government
Federal Aviation Agency
Federal Communications Commission
Federal Radiation Council
General Services Administration
Interstate Commerce Commission
National Aeronautics and Space Administration
National Aeronautics and Space Council
United States Civil Service Commission
United States Information Agency
Agency for International Development
Office of Emergency Planning
Peace Corps

President's Foreign Intelligence Advisory Board
United States Arms Control and Disarmament Agency

(b) In the following departments, agencies, and Governmental units, having partial but not primary responsibility for matters pertaining to national defense, the authority for original classification of information or material under this order shall be exercised only by the head of the department, agency, or Governmental unit without delegation:

Post Office Department
Department of the Interior
Department of Agriculture
Department of Health, Education, and Welfare
Civil Aeronautics Board
Federal Maritime Commission
Federal Power Commission
National Science Foundation
Panama Canal Company
Renegotiation Board
Small Business Administration
Subversive Activities Control Board
Tennessee Valley Authority

(c) Any agency or unit of the executive branch not named herein, and any such agency or unit which may be established hereafter, shall be deemed not to have authority for original classification of information or material under this order, except as such authority may be specifically conferred upon any such agency or unit hereafter.

SECTION 3. *Classification:* Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) *Documents in General:* Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) *Physically Connected Documents:* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) *Multiple Classifications:* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) *Transmitted Letters:* A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

(e) *Information Originated by a Foreign Government or Organization:* Defense information of a classified nature furnished to the United States by a foreign government or international organization shall be assigned a classification which will assure a degree of protection

equivalent to or greater than that required by the government or international organization which furnished the information.

SECTION 4. *Declassification, Downgrading, or Upgrading:* When classified information or material no longer requires its present level of protection in the defense interest, it shall be downgraded or declassified in order to preserve the effectiveness and integrity of the classification system and to eliminate classification of information or material which no longer require classification protection. Heads of departments or agencies originating classified information or material shall designate persons to be responsible for continuing review of such classified information or material on a document-by-document, category, project, program, or other systematic basis, for the purpose of declassifying or downgrading whenever national defense considerations permit, and for receiving requests for such review from all sources. However, Restricted Data and material formerly designated as Restricted Data shall be handled only in accordance with subparagraph 4(a)(1) below and section 13 of this order. The following special rules shall be observed with respect to changes of classification of defense information or material, including information or material heretofore classified:

(a) *Automatic Changes:* In order to insure uniform procedures for authomatic changes, heads of departments and agencies having authority for original classification of information or material, as set forth in section 2, shall categorize such classified information or material into the following groups:

(1) *Group 1:* Information or material originated by foreign governments or international organizations and over which the United States Government has no jurisdiction, information or material provided for by statutes such as the Atomic Energy Act, and information or material requiring special handling, such as intelligence and cryptography. This information and material is excluded from automatic downgrading or declassification.

(2) *Group 2:* Extremely sensitive information or material which the head of the agency or his designees exempt, on an individual basis, from automatic downgrading and declassification.

(3) *Group 3:* Information or material which warrants some degree of classification for an indefinite period. Such information or material shall become automatically downgraded at 12-year intervals until the lowest classification is reached, but shall not become automatically declassified.

(4) *Group 4:* Information or material which does not qualify for, or is not assigned to, one of the first three groups. Such information or material shall become automatically downgraded at three-year intervals until the lowest classification is reached, and shall be automatically declassified twelve years after date of issuance.

To the fullest extent practicable, the classifying authority shall indicate on the information or material at the time of original classification if it can be downgraded or declassified at an earlier date, or if it can be downgraded or declassified after a specified event, or upon the removal of classified attachments or enclosures. The heads, or their designees, of departments and agencies in possession of defense information or material classified pursuant to this order, but not bearing markings for automatic downgrading or declassification, are hereby authorized to mark or designate for automatic downgrading

or declassification such information or material in accordance with the rules or regulations established by the department or agency that originally classified such information or material.

(b) *Non-Automatic Changes:* The persons designated to receive requests for review of classified material may downgrade or declassify such material when circumstances no longer warrant its retention in its original classification provided the consent of the appropriate classifying authority has been obtained. The downgrading or declassification of extracts from or paraphrases of classified documents shall also require the consent of the appropriate classifying authority unless the agency making such extracts knows positively that they warrant a classification lower than that of the document from which extracted, or that they are not classified.

(c) *Material Officially Transferred:* In the case of material transferred by or pursuant to statute or Executive order from one department or agency to another for the latter's use and as part of its official files or property, as distinguished from transfers merely for purposes of storage, the receiving department or agency shall be deemed to be the classifying authority for all purposes under this order, including declassification and downgrading.

(d) *Material Not Officially Transferred:* When any department or agency has in its possession any classified material which has become five years old, and it appears (1) that such material originated in an agency which has since become defunct and whose files and other property have not been officially transferred to another department or agency within the meaning of subsection (c), above, or (2) that it is impossible for the possessing department or agency to identify the originating agency, and (3) a review of the material indicates that it should be downgraded or declassified, the said possessing department or agency shall have power to declassify or downgrade such material. If it appears probable that another department or agency may have a substantial interest in whether the classification of any particular information should be maintained, the possessing department or agency shall not exercise the power conferred upon it by this subsection, except with the consent of the other department or agency, until thirty days after it has notified such other department or agency of the nature of the material and of its intention to declassify or downgrade the same. During such thirty-day period the other department or agency may, if it so desires, express its objections to declassifying or downgrading the particular material, but the power to make the ultimate decision shall reside in the possessing department or agency.

(e) *Information or Material Transmitted by Electrical Means:* The downgrading or declassification of classified information or material transmitted by electrical means shall be accomplished in accordance with the procedures described above unless specifically prohibited by the originating department or agency. Unclassified information or material which is transmitted in encrypted form shall be safeguarded and handled in accordance with the regulations of the originating department or agency.

(f) *Downgrading:* If the recipient of classified material believes that it has been classified too highly, he may make a request to the reviewing official who may downgrade or declassify the material after obtaining the consent of the appropriate classifying authority.

(g) *Upgrading:* If the recipient of unclassified information or material believes that it should be classified, or if the recipient of classified information or material believes that its classification is not sufficiently protective, it shall be safeguarded in accordance with the classification deemed appropriate and a request made to the reviewing official, who may classify the information or material or upgrade the classification after obtaining the consent of the appropriate classifying authority. The date of this action shall constitute a new date of origin insofar as the downgrading or declassification schedule (paragraph (a) above) is concerned.

(h) *Departments and Agencies Which Do Not Have Authority for Original Classification:* The provisions of this section relating to the declassification of defense information or material shall apply to departments or agencies which do not, under the terms of this order, have authority for original classification of information or material, but which have formerly classified information or material pursuant to Executive Order No. 10290 of September 24, 1951.

(i) *Notification of Change in Classification:* In all cases in which action is taken by the reviewing official to downgrade or declassify earlier than called for by the automatic downgrading-declassification stamp, the reviewing official shall promptly notify all addressees to whom the information or material was originally transmitted. Recipients of original information or material, upon receipt of notification of change in classification, shall notify addressees to whom they have transmitted the classified information or material.

SECTION 5. *Marking of Classified Material:* After a determination of the proper defense classification to be assigned has been made in accordance with the provisions of this order, the classified material shall be marked as follows:

(a) *Downgrading-Declassification Markings:* At the time of origination, all classified information or material shall be marked to indicate the downgrading-declassification schedule to be followed in accordance with paragraph (a) of section 4 of this order.

(b) *Bound Documents:* The assigned defense classification on bound documents, such as books or pamphlets, the pages of which are permanently and securely fastened together, shall be conspicuously marked or stamped on the outside of the front cover, on the title page, on the first page, on the back page and on the outside of the back cover. In each case the markings shall be applied to the top and bottom of the page or cover.

(c) *Unbound Documents:* The assigned defense classification on unbound documents, such as letters, memoranda, reports, telegrams, and other similar documents, the pages of which are not permanently and securely fastened together, shall be conspicuously marked or stamped at the top and bottom of each page, in such manner that the marking will be clearly visible when the pages are clipped or stapled together.

(d) *Charts, Maps and Drawings:* Classified charts, maps, and drawings shall carry the defense classification marking under the legend, title block, or scale in such manner that it will be reproduced on all copies made therefrom. Such classification shall also be marked at the top and bottom in each instance.

(e) *Photographs, Films and Recordings:* Classified photographs, films, and recordings, and their containers, shall be conspicuously and appropriately marked with the assigned defense classification.

(f) *Products or Substances:* The assigned defense classification shall be conspicuously marked on classified products or substances, if possible, and on their containers, if possible, or, if the article or container cannot be marked, written notification of such classification shall be furnished to recipients of such products or substances.

(g) *Reproductions:* All copies or reproductions of classified material shall be appropriately marked or stamped in the same manner as the original thereof.

(h) *Unclassified Material:* Normally, unclassified material shall not be marked or stamped *Unclassified* unless it is essential to convey to a recipient of such material that it has been examined specifically with a view to imposing a defense classification and has been determined not to require such classification.

(i) *Change or Removal of Classification:* Whenever classified material is declassified, downgraded, or upgraded, the material shall be marked or stamped in a prominent place to reflect the change in classification, the authority for the action, the date of action, and the identity of the person or unit taking the action. In addition, the old classification marking shall be cancelled and the new classification (if any) substituted therefor. *Automatic* change in classification shall be indicated by the appropriate classifying authority, through marking or stamping in a prominent place to reflect information specified subsection 4(a) hereof.

(j) *Material Furnished Persons Not in the Executive Branch of the Government:* When classified material affecting the national defense is furnished authorized persons, in or out of Federal service, other than those in the executive branch, the following notation, in addition to the assigned classification marking, shall whenever practicable be placed on the material, on its container, or on the written notification of its assigned classification:

> "This material contains information affecting the national defense of the United States within the meaning of the espionage laws, Title 18, U.S.C., Secs. 793 and 794, the transmission or revelation of which in any manner to an unauthorized person is prohibited by law."

Use of alternative marking concerning "Restricted Data" as defined by the Atomic Energy Act is authorized when appropriate.

SECTION 6. *Custody and Safekeeping:* The possession or use of classified defense information or material shall be limited to locations where facilities for secure storage or protection thereof are available by means of which unauthorized persons are prevented from gaining access thereto. Whenever such information or material is not under the personal supervision of its custodian, whether during or outside of working hours, the following means shall be taken to protect it:

(a) *Storage of Top Secret Information and Material:* As a minimum, Top Secret defense information and material shall be stored in a safe or safe-type steel file container having a three-position dial-type combination lock, and being of such weight, size, construction, or installation as to minimize the possibility of unauthorized access to, or the physical theft of, such information and material. The head of a department or agency may approve other storage facilities which afford equal protection, such as an alarmed area, a vault, a vault-type room, or an area under continuous surveillance.

(b) *Storage of Secret and Confidential Information and Material:* As a minimum, Secret and Confidential defense information and material

may be stored in a manner authorized for Top Secret information and material, or in steel file cabinets equipped with steel lockbar and a changeable three-combination dial-type padlock or in other storage facilities which afford equal protection and which are authorized by the head of the department or agency.

(c) *Storage or Protection Equipment:* Whenever new security storage equipment is procured, it should, to the maximum extent practicable, be of the type designated as security filing cabinets on the Federal Supply Schedule of the General Services Administration.

(d) *Other Classified Material:* Heads of departments and agencies shall prescribe such protective facilities as may be necessary in their departments or agencies for material originating under statutory provisions requiring protection of certain information.

(e) *Changes of Lock Combinations:* Combinations on locks of safekeeping equipment shall be changed, only by persons having appropriate security clearance, whenever such equipment is placed in use after procurement from the manufacturer or other sources, whenever a person knowing the combination is transferred from the office to which the equipment is assigned, or whenever the combination has been subjected to compromise, and at least once every year. Knowledge of combinations shall be limited to the minimum number of persons necessary for operating purposes. Records of combinations shall be classified no lower than the highest category of classified defense material authorized for storage in the safekeeping equipment concerned.

(f) *Custodian's Responsibilities:* Custodians of classified defense material shall be responsible for providing the best possible protection and accountability for such material at all times and particularly for securely locking classified material in approved safekeeping equipment whenever it is not in use or under direct supervision of authorized employees. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified defense information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

(g) *Telephone Conversations:* Defense information classified in the three categories under the provisions of this order shall not be revealed in telephone conversations, except as may be authorized under section 8 hereof with respect to the transmission of Secret and Confidential material over certain military communications circuits.

(h) *Loss or Subjection to Compromise:* Any person in the executive branch who has knowledge of the loss or possible subjection to compromise of classified defense information shall promptly report the circumstances to a designated official of his agency, and the latter shall take appropriate action forthwith, including advice to the originating department or agency.

SECTION 7. *Accountability and Dissemination:* Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classi-

fied defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

(a) *Accountability Procedures:* Heads of departments and agencies shall prescribe such accountability procedures as are necessary to control effectively the dissemination of classified defense information, with particularly severe control on material classified Top Secret under this order. Top Secret Control Officers shall be designated, as required, to receive, maintain accountability registers of, and dispatch Top Secret material.

(b) *Dissemination Outside the Executive Branch:* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

(c) *Information Originating in Another Department or Agency:* Except as otherwise provided by section 102 of the National Security Act of July 26, 1947, c. 343, 61 Stat. 498, as amended, 50 U.S.C. sec. 403, classified defense information originating in another department or agency shall not be disseminated outside the receiving department or agency without the consent of the originating department or agency. Documents and material containing defense information which are classified Top Secret or Secret shall not be reproduced without the consent of the originating department or agency.

SECTION 8. *Transmission:* For transmission outside of a department or agency, classified defense material of the three categories originated under the provisions of this order shall be prepared and transmitted as follows:

(a) *Preparation for Transmission:* Such material shall be enclosed in opaque inner and outer covers. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and address. The outer cover shall be sealed and addressed with no indication of the classification of its contents. A receipt form shall be attached to or enclosed in the inner cover, except that Confidential material shall require a receipt only if the sender deems it necessary. The receipt form shall identify the addressor, addressee, and the document, but shall contain no classified information. It shall be signed by the proper recipient and returned to the sender.

(b) *Transmitting Top Secret Material:* The transmission of Top Secret material shall be effected preferably by direct contact of officials concerned, or, alternatively, by specifically designated personnel, by State Department diplomatic pouch, by a messenger-courier system especially created for that purpose, or by electric means in encrypted form; or in the case of information transmitted by the Federal Bureau of Investigation, such means of transmission may be used as are currently approved by the Director, Federal Bureau of Investigation, unless express reservation to the contrary is made in exceptional cases by the originating agency.

(c) *Transmitting Secret Information and Material:* Secret information and material shall be transmitted within and between the forty-

eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for Top Secret information and material, by authorized courier, by United States registered mail, or by the use of protective services provided by commercial carriers, air or surface, under such conditions as may be prescribed by the head of the department or agency concerned. Secret information and material may be transmitted outside those areas by one of the means established for Top Secret information and material, by commanders or masters of vessels of United States registry, or by the United States registered mail through Army, Navy, Air Force, or United States civil postal facilities; provided that the information or material does not at any time pass out of United States Government control and does not pass through a foreign postal system. For the purposes of this section registered mail in the custody of a transporting agency of the United States Post Office is considered within United States Government control unless the transporting agent is foreign controlled or operated. Secret information and material may, however, be transmitted between United States Government or Canadian Government installations, or both, in the forty-eight contiguous States, the District of Columbia, Alaska, and Canada by United States and Canadian registered mail with registered mail receipt. Secret information and material may also be transmitted over communications circuits in accordance with regulations promulgated for such purpose by the Secretary of Defense.

(d) *Transmitting Confidential Information and Material:* Confidential information and material shall be transmitted within the forty-eight contiguous States and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for higher classifications, or by certified or first-class mail. Outside those areas confidential information and material shall be transmitted in the same manner as authorized for higher classifications.

(e) *Within an Agency:* Preparation of classified defense material for transmission, and transmission of it, within a department or agency shall be governed by regulations, issued by the head of the department or agency, insuring a degree of security equivalent to that outlined above for transmission outside a department or agency.

SECTION 9. *Disposal and Destruction:* Documentary record material made or received by a department or agency in connection with transaction of public business and preserved as evidence of the organization, functions, policies, operations, decisions, procedures or other activities of any department or agency of the Government, or because of the informational value of the data contained therein, may be destroyed only in accordance with the act of July 7, 1943, c. 192, 57 Stat. 380, as amended, 44 U.S.C. 366–380. Non-record classified material, consisting of extra copies and duplicates including shorthand notes, preliminary drafts, used carbon paper, and other material of similar temporary nature, may be destroyed, under procedures established by the head of the department or agency which meet the following requirements, as soon as it has served its purpose:

(a) *Methods of Destruction:* Classified defense material shall be destroyed by burning in the presence of an appropriate official or by other methods authorized by the head of an agency provided the resulting destruction is equally complete.

(b) *Records of Destruction:* Appropriate accountability records maintained in the department or agency shall reflect the destruction of classified defense material.

SECTION 10. *Orientation and Inspection:* To promote the basic purposes of this order, heads of those departments and agencies originating or handling classified defense information shall designate experienced persons to coordinate and supervise the activities applicable to their departments or agencies under this order. Persons so designated shall maintain active training and orientation programs for employees concerned with classified defense information to impress each such employee with his individual responsibility for exercising vigilance and care in complying with the provisions of this order. Such persons shall be authorized on behalf of the heads of the departments and agencies to establish adequate and active inspection programs to the end that the provisions of the order are administered effectively.

SECTION 11. *Interpretation of Regulations by the Attorney General:* The Attorney General, upon request of the head of a department or agency or his duly designated representative, shall personally or through authorized representatives of the Department of Justice render an interpretation of these regulations in connection with any problems arising out of their administration.

SECTION 12. *Statutory Requirements:* Nothing in this order shall be construed to authorize the dissemination, handling or transmission of classified information contrary to the provisions of any statute.

SECTION 13. *"Restricted Data," Material Formerly Designated as "Restricted Data," Communications Intelligence, and Cryptography:* (a) Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. "Restricted Data," and material formerly designated as "Restricted Data," shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

(b) Nothing in this order shall prohibit any special requirements that the originating agency or other appropriate authority may impose as to communications intelligence, cryptography, and matters related thereto.

SECTION 14. *Combat Operations:* The provisions of this order with regard to dissemination, transmission, or safekeeping of classified defense information or material may be so modified in connection with combat or combat-related operations as the Secretary of Defense may by regulations prescribe.

SECTION 15. *Exceptional Cases:* When, in an exceptional case, a person or agency not authorized to classify defense information originates information which is believed to require classification, such person or agency shall protect that information in the manner prescribed by this order for that category of classified defense information into which it is believed to fall, and shall transmit the information forthwith, under appropriate safeguards, to the department, agency, or person having both the authority to classify information and a direct official interest in the information (preferably, that department, agency, or person to which the information would be transmitted in the ordinary course of business), with a request that such department, agency, or person classify the information.

Historical Research: As an exception to the standard for access prescribed in the first sentence of section 7, but subject to all other provisions of this order, the head of an agency may permit persons outside the executive branch performing functions in connection with historical research projects to have access to classified defense information originated within his agency if he determines that: (a) access to the information will be clearly consistent with the interests of national defense, and (b) the person to be granted access is trustworthy; *Provided,* that the head of the agency shall take appropriate steps to assure that classified information is not published or otherwise compromised.

SECTION 16. *Review to Insure That Information Is Not Improperly Withheld Hereunder:* The President shall designate a member of his staff who shall receive, consider, and take action upon, suggestions or complaints from non-Governmental sources relating to the operation of this order.

SECTION 17. *Review to Insure Safeguarding of Classified Defense Information:* The National Security Council shall conduct a continuing review of the implementation of this order to insure that classified defense information is properly safeguarded, in conformity herewith.

SECTION 18. *Review Within Departments and Agencies:* The head of each department and agency shall designate a member or members of his staff who shall conduct a continuing review of the implementation of this order within the department or agency concerned to insure that no information is withheld hereunder which the people of the United States have a right to know, and to insure that classified defense information is properly safeguarded in conformity herewith.

SECTION 19. *Unauthorized Disclosure by Government Personnel:* The head of each department and agency is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been knowingly responsible for any release or disclosure of classified defense information or material except in the manner authorized by this order, and where a violation of criminal statutes may be involved, to refer promptly to the Department of Justice any such case.

SECTION 20. *Revocation of Executive Order No. 10290:* Executive Order No. 10290 of September 24, 1951 is revoked as of the effective date of this order.

SECTION 21. *Effective Date:* This order shall become effective on December 15, 1953.

Appendix II. Authority for Executive Order 10290

SENATE COMMITTEE ON EXPENDITURES
IN THE EXECUTIVE DEPARTMENTS,
November 29, 1951.

Staff memorandum No. 82-1-60.
Subject: Constitutional and legal aspects of S. 2190, a bill to prohibit unreasonable suppression of information by the executive branch of the Government (repeal of Executive Order No. 10290).

INTRODUCTION

On September 24, 1951, the President of the United States promulgated Executive Order No. 10290, prescribing regulations establishing minimum standards for the classification, transmission, and handling by departments and agencies of the executive branch of the Government, of official information relating to the security of the nation.[1]

On September 28, 1951, Senator Bricker, for himself and Senators Capehart and Ferguson, introduced S. 2190 which provides only that "Executive Order No. 10290, dated September 24, 1951, is hereby repealed." [2]

It will be the purpose of this memorandum to provide information to members of the committee which may be helpful to them in determining (1) whether the Congress has the constitutional authority to repeal Executive Order No. 10290; and (2) if the Congress possesses such authority, whether S. 2190, in its present form will accomplish this objective. In approaching these problems, it will be necessary first to examine (1) the nature of the order; and (2) the source of the President's authority to issue it. If it develops that the President issued the order pursuant to a congressional delegation of authority, no further problem is presented, since it is perfectly clear that the Congress can always withdraw powers which it has delegated, or supersede any rules or regulations made thereunder, by its own statutes.[3]

On the other hand, if it is found that the order is based upon the exercise by the President of authority granted to him by the Constitution, it must then be determined whether such authority is exclu-

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[1] Congressional Record (daily edition), Oct. 2, 1951, pp. 12711-12714; 16 F.R. 9795.

[2] Ibid., Sept. 28, 1951, p. 12555.

[3] James Hart, "The Exercise of Rule-Making Power: Studies on Administrative Management in the Government of the United States," No. 5. The President's Committee on Administrative Management (1937), p. 27. See also, John P. Comer, "Legislative Functions of National Administrative Authorities" (1927), p. 185; James Hart, "The Ordinance Making Power of the President" (1925), ch. XI.

"Where he [the President] has a power as a consequence of the action of Congress, * * * the continued exercise of the power by the President is dependent upon the will of Congress, which may, at any time, repeal the act granting the powers" (Frank J. Goodnow, "The Principles of the Administrative Law of the United States" (1905), p. 84).

Congress has repealed Executive orders, issued pursuant to a statutory delegation of authority, on numerous occasions. See, for example, 47 Stat. 1123, sec. 1240, repealing Executive Order 5971/2; 57 Stat. 63, sec. 4(b), repealing Executive Order 9250; 59 Stat. 5, repealing Executive Order 9071; 61 Stat. 477, sec. 6, repealing Executive Order 27-A; and 61 Stat. 921, repealing Executive Order 8843.

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sive,[4] coordinate,[5] or concurrent.[6] If it is found to be exclusive then the Congress can do nothing to interfere with the Presidential action.[7] If, however, it is either coordinate or concurrent, the Congress has constitutional authority to act in modification of the Presidential directive.[8]

The Nature of Executive Order 10290

A detailed analysis of the provisions of Executive Order 10290 will be found in staff memorandum No. 82–1–59, dated November 14, 1951. For the purposes of this inquiry, it will be sufficient to note that the order is addressed to "Heads of Executive Departments and Agencies" and authorizes them or their designated subordinates, to assign, within specified categories, the classifications to be given to any official information "the safeguarding of which is necessary in the interest of national security, and which is classified for such purposes" by the heads of the originating agencies.

The regulations promulgated by this order do not affect directly relations between the Government and private citizens and are not binding upon the general public.[9] They constitute a mandate by the Chief Executive to his subordinates, in their capacities as officers, agents, or employees of the Federal Government, with respect to the manner in which they are to perform their duties and exercise their discretion. Executive orders of this type are generally referred to as "administrative ordinances" [10] or "administrative regulations," [11] and are enforced through the President's removal power.[12]

Virtually every President has issued orders of this nature. Thus, Grant issued an order providing that after a certain date, persons holding Federal offices would, with specified exceptions, be expected not to accept or continue to hold State, Territorial, or municipal offices at the same time. Action contrary to this order would be

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[4] E.g., the President's constitutional power to grant pardons. U.S. Constitution, art. II, sec. II: or his recognition power. Comer, op. cit., note 3, p. 25. See also John M. Mathews, "The American Constitutional System" (second edition, 1940), p. 176.

[5] E.g., the President's treatymaking power, or his appointment of ambassadors, judges, and other specified officers U.S. Constitution, art. II, sec. II.

[6] E.g., establishing civil government in occupied areas prior to annexation and pending congressional action. *Santiago* v. *Nogueras*, 214 U.S. 26e (1909); or issuing regulations for branches of the civil service until Congress has acted. See Hart, "The exercise of Rule-Making Power," op. cit. supra, note 3, p. 22.

[7] "Executive orders, authorization for which is derived from the Constitution, are naturally subject only to the provisions of that document." Harvey Walker, "The Legislative Process" (1948), p. 31. "This authority is exercised without reference to the legislative body." Ibid., p. 407. Thus, "Congress cannot limit the exercise by the President of the pardoning power * * *." Mathews, op. cit. supra, note 4, p. 176; and the President's recognition power "belongs to the President and to him alone." Hart, "The Ordinance Making Power of the President," op. cit. supra, note 3, p. 215; Quincey Wright, "The Control of American Foreign Relations" (1922), pp. 270–271. The exclusive nature of the pardoning power is dealt with in ex parte Garland, 4 Wall. 333 (1867): "The power of the President [to grant pardons] is not subject to legislative control" Ibid. See also *U.S.* v. *Klein*, 13 Wall 128 (1872). "Congress may not restrict the President in the exercise of his power of pardon." William H. Taft, "Our Chief Magistrate and His Powers" (1925), p. 119.

[8] "The statutes of Congress are the sole source of all powers to make rules and regulations having the force and effect of law, except to the limited extent that the President derives such powers directly from the Constitution, as when he issues general amnesties by virtue of his pardoning power." Hart, "The Exercise of Rule-Making Power," op. cit. supra, note 3, p. 279 "* * * practically all writers agree that Congress has either direct or indirect control over the independent lawmaking power of the President and can cover the field to the exclusion of the Executive. If Congress acts before or after the President, either in harmony with or against him, the will of that body is taken as the basis for action rather than that of the Chief Executive." Comer, op. cit. supra, note 3, p. 25.

[9] J. W. Garner, "Political Science and Government" (1932) p. 713. See also James Hart, "Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement," 13 Univ. of Virg. L. Rev. 86, 96; Hart, "The Exercise of Rule-Making Power," op. cit., supra, note 3, p. 9; Walker, op. cit., supra, note 7, p. 30. (The President's statement accompanying Executive Order 10290 states that "The public is requested to cooperate but is under no compulsion or threat of penalty to do so as a result of the order".)

[10] "The 'administrative' ordinances are orders or regulations addressed to the administrative authorities and contain rules governing the conduct or functioning of the administrative services." Garner, loc. cit. supra, note 9.

[11] Hart, "The Exercise of Rule-Making Power," op. cit. supra, note 3, p. 11.

[12] Id., at p. 23; Hart, "Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement", op. cit. supra, note 9, p. 96.

deemed a resignation from the Federal office, and heads of departments and other appointing officers of the Federal Government were required to apply this order within the sphere of their respective departments or offices and as related to the persons holding appointments under them.[13]

Another example of this type of administrative ordinance is found in an order issued by President Taft, during the first year of his administration, prohibiting any subordinate from responding to requests for information from any Member of Congress except as authorized by the head of the department.[14]

It will be noted that in both of the above-cited instances, as well as in the case of Executive Order 10290, the President issued instructions to his subordinates with respect to the manner in which they were to discharge duties imposed upon them by law. In the case of the Grant order, the instructions related to the circumstances under which agency heads could hire and fire. In the case of the Taft order, the instructions related to the manner in which information in the custody of the executive branch was to be safeguarded and/or released.

The Source of the President's Authority To Issue Executive Order 10290

At the outset, it should be noted that no question is raised concerning the power of the President to issue Executive Order 10290.[15] It will be recalled, however, that it is necessary to establish the source of the President's authority to issue the order, prior to any determination of the action which the Congress may lawfully take to nullify it.

Executive Order 10290 cites no specific constitutional or statutory authority for its issuance. It recites only that it is issued "by virtue of the authority vested in me by the Constitution and statutes and as President of the United States, * * *." [16] Since there appears to be no statute expressly authorizing the issuance of the order, it must be assumed that it is based upon the President's constitutional power, either expressed or implied.

As indicated earlier, the President derives his authority to issue Executive orders from two sources: (1) the Constitution; and (2) acts of Congress which delegate various powers to him. Authority derived from the Constitution may arise either out of one of his specifically granted powers, such as Commander in Chief of the Armed Forces, or the power to grant pardons; or it may arise out of his position as the Chief Executive who is under an obligation to take care that the laws be faithfully executed.[17]

An examination of those sections of the Constitution which expressly confer powers upon the President fails to reveal any specific authority

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[13] Hart, "The Ordinance Making Power of the President," op. cit. supra, note 3, pp. 211-212.

[14] Robert Luce, "Legislative Problems" (1935), p. 323.

[15] Senator Bricker, speaking in support of S. 2190 on the floor of the Senate, observed that "it seems reasonably certain that the President's order is not unconstitutional" (Congressional Record (daily edition), Oct. 2, 1951, p. 12731).

[16] Congressional Record, op. cit., supra, note 1, p. 12711.

[17] "The Floyd Acceptances," 7 Wall. 666 676 (1868); Hart, "The Ordinance Making Power of the President," op. cit., supra, note 3, p. 51; Taft, "Our Chief Magistrate and His Powers" (1925), pp 139-140. "The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant and proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof." Ibid., Walker, op. cit., supra, note 7, p. 29.

for the issuance of an order of the type here under consideration. It thus appears that authority for the issuance of the order stems from article II, section 1, and article III, section 3.

Article II, section 1, provides, in part, that "The executive Power shall be vested in a President of the United States of America * * *," and article II, section 3, provides that "* * * he shall take Care that the Laws be faithfully executed, * * *." These two clauses, when taken together with the President's power of appointment and removal, have been held to vest in him a general power of direction over the executive branch of the Government,[18] which is exercised, to a large extent, by the issuance of administrative ordinances and regulations which generally take the form of Executive orders.[19]

Referring to this power of general direction, Prof. John Fairlie, one of the early leading authorities on the subject, noted, more than 45 years ago, that—

"Not only does the President exercise much influence over the personnel of the administration through his power of nomination and removal, but he can also control and direct in large degree, the actions of the administrative officials. *The constitutional provisions which authorize this power are those vesting the executive power in the President, and requiring him to take care that the laws be faithfully executed.*" [20]

More recently, Prof. James Hart, an outstanding contemporary authority on the President's powers, wrote:

"This general power [of direction] supplies the President, without need for statutory authorization, with a reservoir of power for overall management which he has used from time to time * * *. It enables him to control his subordinates in the exercise of their statutory discretion as well as in the political aspects of their respective jobs. It derives simply from his administrative relation to these subordinates as an incident of the relation of administrative superior to administrative inferior. *This relation, in turn, is a corollary of the President's position as 'The' Executive, taken together with his constitutional duty to take care that the laws be faithfully executed and his constitutional powers of appointment and removal at pleasure.*" [21]

This general power of direction appears to be based upon the following propositions: (1) As Chief Executive, constitutionally responsible for the faithful execution of the laws, the President must have subordinates to assist him; and (2) since the Constitution places this obligation upon him rather than upon his subordinates, he must be able not only to select those whom he desires to act for him, but also to direct them as to the manner in which they shall execute the laws, and to remove them if they do not follow his directions.[22]

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[18] "Our conclusion * * * is that art. II grants to the President the Executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed." Taft, C. J., in *Myers* v. *United States*, 272 U.S. 52, 163–4 (1926). See also John A. Fairlie, "The Administrative Powers of the President," 2 Mich. L. Rev. 190, 201, 205 (1903). Hart, "The Exercise of Rule-Making Power," op. cit. supra, note 3, p. 21; Hart, "Ordinance Making Powers of the President," North American Review, July 1923, pp. 65–66; Mathews, op. cit. supra, note 4, pp. 174–175 and footnote 1 therein. Cf. *Cunningham* v. *Neagle*, 135 U.S. 1, 63 (1890).

[19] "* * * The President's control over the conduct of the Federal administration is exercised in large measure by the issue of ordinances or Executive regulations." Fairlie, op. cit. supra, note 18, p. 205: "No doubt, he may also, even without congressional authorization, under his duty to 'take care that the laws be faithfully executed,' issue Executive orders to his subordinates in the civil administration. Perhaps also the fact that in him is vested 'the Executive power' gives him a certain power of administrative contro which is exercisable by regulations and ordinances." Hart, "Ordinance Making Powers of the President," loc. cit. supra, note 18. See also, Mathews, op. cit. supra, note 4, pp. 174–175.

[21] Fairlie, op. cit. supra, note 18, p. 201. [Italic supplied.]

[22] Hart, "The Exercise of Rule-Making Power," op. cit. supra, note 3, p. 21. [Italic supplied.]

[23] *Myers* v. *United States*, 272 U.S. 52 (1926).

This interpretation was clearly enunciated by Chief Justice Taft in *Myers* v. *United States*,[23] as follows:

"The vesting of the Executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his Executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." [24]

From the foregoing discussion, it appears clear that when the President issued Executive Order 10290, he was exercising his constitutional general power of direction in order to insure that the laws would be faithfully executed. The laws, in this instance, would seem to be those sections of the Federal Criminal Code which are concerned with internal security and the safeguarding of classified and security information, in particular, and espionage, in general.[25]

Limitations on the President's Power To Issue Executive Order 10290

Although the President's general direction power is constitutional in its source, it is by no means absolute. On the contrary, all authorities agree that its exercise is subject to important limitations.[26] Foremost among these is the well settled rule that an Executive order, or any other Executive action, whether by formal order or by regulation, cannot contravene an act of Congress which is constitutional. Thus, when an Executive order collides with a statute which is enacted pursuant to the constitutional authority of the Congress, the statute will prevail.[27] This rule, in turn, gives rise to a further limitation which finds its source in the power of the Congress to set forth specifically the duties of various officers and employees of the executive branch.[28] Since the President can control only those duties of his subordinates which are discretionary, to the extent that the Congress prescribes these duties in detail, these officials can exercise no

[23] Ibid.
[24] Id., at p. 117.
[25] United States Code, title 18, as amended, secs. 791 et seq.
[26] *United States* v. *Symonds*, 120 U.S. 46 (1887); Comer, op. cit. supra, note 3, p. 25; Fairlie, op. cit. supra, note 18, p. 209; Hart, "The Exercise of Rule-Making Power," op. cit. supra, note 3, pp. 21-22; Hart, "The Ordinance Making Power of the President," op. cit. supra, note 3, p. 228.
[27] *Kendall* v. *United States*, 12 Peters 524 (1838); Fairlie, op. cit. supra, note 18, p. 257; Hart, "The Exercise of Rule-Making Power," op. cit. supra, note 3, p. 21.
[28] *Kendall* v. *United States*, supra. "* * * it by no means follows, that every officer in every branch of that department [executive] is under the exclusive direction of the President. * * * There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. * * *". Id., at p. 610. See also S. Rept. 837, 46th Cong., 3d sess., where a select committee, in discussing the relationship between the Congress and Cabinet heads, observed that "The Secretaries were made heads of departments; they were charged by law with certain duties, and invested by law with certain powers to be used by them in the administration confided to them by the laws. * * * They are the creatures of law and bound to do the bidding of the law." Id., at p. 7. An excellent summary of limitations upon the executive control of the administration, conferred by the Constitution upon the Congress, is found in Meriam and Schmeckebier, "Reorganization of the National Government," (1939), pp. 125-126.

discretion and their actions cannot be controlled by the President. In other words, if the Congress enacts a statute which is constitutionally within its authority, the President cannot lawfully, either by Executive order, regulation, or any other means, direct his subordinates to disobey that statute, regardless of whether it affects third persons or whether it is only a directive concerning the management of the executive branch of the Government.[29]

This was clearly pointed out in *United States* v. *Symonds*,[30] where the U.S. Supreme Court held that a regulation issued by the Secretary of the Navy, with the approval of the President, was void when it contravened a statute on the same subject, even though the regulation was an exercise of the President's constitutional power as Commander in Chief of the Navy. In reaching this conclusion, the Court said (Harlan, J.):

"The authority of the Secretary [of the Navy] to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the Naval Establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. *He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights on others.*" [31]

Prof. John Comer, author of a leading work on legislative functions of administrative authorities, in referring to this limitation on the President's powers, observed:

"* * * with few exceptions, such as the 'recognition ordinances,' practically all writers agree that Congress has either direct or indirect control over the independent law-making power of the President and can cover the field to the exclusion of the Executive. *If Congress acts before or after the President, either in harmony with or against him, the will of that body is taken as the basis for action rather than that of the Chief Executive.*" [32]

Professor Hart, in his definitive work, "The Ordinance Making Powers of the President," made the following observations concerning the limitations which surround the President's power:

"*As between Executive orders and statutes, the heads of departments and all officers of the Government are bound to follow the latter until they have been declared invalid by the courts.* Nor may the Executive orders of this character regulate the functions of officers in a manner which seems to usurp the power of Congress to enact the laws necessary and proper to carry into execution the powers vested by the Constitution in that body and in other departments and officers of the Government. This gives Congress the power to create departments and to prescribe their major duties, and the President has no concurrent powers in the premises. *Everything that he does must be ancillary to the statutory rules of Congress and conducive to their better execution.* * * *" [33]

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[29] See authorities cited supra, notes 26, 27, and 28.
[30] 120 U.S. 46 (1887).
[31] Id at 49. [Italic supplied.]
[32] Comer, loc. cit. supra, note 26. [Italic supplied.]
[33] Hart, loc. cit. supra, note 26. [Italic supplied.]

In a later work on the scope of the President's power of direction, Professor Hart observed:

"The general power of direction is * * * purely an administrative power. It is a constitutional power in the sense that it is a byproduct of an administrative relation which follows from the constitutional position of the President, as well as in the sense that Congress may not disturb this relation in the case of any officer that the President appoints and that the courts class as a 'purely executive' officer. But it is not confined to the limits of any specific range of power. Rather it is as broad as the range of the subordinate's discretion. This includes all choices incidental to the subordinate's job. It includes especially all choices involved in the exercise of the subordinate's legal discretion. *The range of such legal discretion is completely defined in the statutes. Hence, the general power of direction is dependent upon the statutes; for insofar as Congress goes into detail, and thus reduces the functions of executive officers to clerical or ministerial functions, to that extent they have no choice for the President to control.* * * *" [34]

At this point, the following conclusions may be drawn: (1) The President had the constitutional authority to issue Executive Order 10290; (2) this authority was derived from his general power of direction over the executive branch of the Government; (3) the general power of direction is not an exclusive power specifically conferred upon the President by the Constitution, but is implied from his position as the Chief Executive, coupled with his constitutional obligation faithfully to execute the laws, and his power of appointment and removal; and (4) the general power of direction is strictly limited in that action taken by the President pursuant thereto must not conflict with congressional action which is constitutionally authorized.

Does the Congress Have Constitutional Authority To Repeal Executive Order 10290?

The precise question here presented is whether the Congress has the power to repeal an Executive order issued pursuant to constitutional power of the President which is neither specifically conferred nor exclusive and is in the nature of an administrative directive issued by the President to his subordinates. Because this problem has never raised a justifiable controversy, it has never been decided by the courts. In the light of the foregoing discussion and the views of leading authorities, it is clear that if the Congress has the constitutional power to enact legislation covering the subject matter of an Executive order, it would then be authorized to cover the field to the exclusion of the President.[35]

As already indicated, Executive Order 10290 appears to have been issued with a view to enforcing those laws which relate to internal security, espionage, and the safeguarding of classified and security information. Accordingly, if the Constitution confers upon the Congress the power to legislate with respect to these matters, it would then appear that the order here in question may be modified, superseded, or repealed.[36]

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[34] Hart, "The Exercise of Rule-Making Power," loc. cit. supra, note 26. [Italic supplied.]
[35] See authorities cited supra, notes 26, 27, and 28.
[36] Ibid.

Article I, section 1, of the Constitution provides that "* * * All legislative Powers herein granted shall be vested in a Congress of the United States, * * *." Article I, section 8, provides that "* * * The Congress shall have Power To * * * provide for the common Defence and general Welfare of the United States; * * *," and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." These clauses would seem to give the Congress ample authority to enact legislation covering the subject-matter of Executive Order 10290, and, under the authorities cited, the President could take no lawful action in conflict with such congressional enactment.[37]

Will S. 2190, in Its Present Form, Accomplish the Repeal of Executive Order 10290?

As previously noted, S. 2190 provides only that "Executive Order 10290, dated September 24, 1951, is hereby repealed." Although it is clear that the Congress has the constitutional authority to enact this bill, its precise effect upon Executive Order 10290 is difficult to assess.

It may be contended, on the one hand, that if the Congress has the power to enact legislation in the field covered by the order, it also has the power to nullify Presidential legislation in the same field with respect to which it is in disagreement. On the other hand, it may be argued that since the Presidential action was constitutionally valid at its inception, more than a mere repealer by the Congress is necessary to nullify it; thus, if the Congress wishes to exercise its power in this field, it must act affirmatively by enacting legislation which will cover the subject matter.

Any attempt to estimate the Presidential reaction to S. 2190 in its present form is equally difficult. On the one hand, the President might acknowledge S. 2190 as a clear expression of congressional disapproval, and so advise his subordinates by a subsequent order modifying his earlier action, or even rescinding it. On the other hand, he might take the position that this action constitutes an unconstitutional interference by the Congress with Presidential prerogatives in that it attempts to hinder or prevent the President from performing his constitutional obligation to take care that the laws are faithfully executed. In that case, he might veto it or permit it to pass without his signature, taking the position that it was merely an expression of congressional opinion rather than an act of affirmative legislation.

Conclusions and Recommendations

In view of the difficulties which appear to be inherent in S. 2190, in its present form, it is suggested that if the committee proposes to take any action, it should be redrafted in such a manner as to set forth in clear and unmistakable terms the congressional policy with respect to those matters covered by Executive Order 10290. If this were done, the heads of the various units of the executive branch who were given authority by the order to classify certain official informa-

[37] Ibid.

tion in the manner set forth therein, would have no discretion with respect to these matters and would be bound to follow the requirements of the law.

It is conceivable, of course, that the President might still consider such action by the Congress as an invasion of his constitutional prerogatives. In that event, he might instruct his subordinates to disregard the law and obey his directive or face dismissal. Such action on his part, however, would be clearly contrary to existing law, since it is well settled that the first duty of a subordinate of the President is to the law. In passing upon this point over 100 years ago, the U.S. Supreme Court said (Thompson, J.):[38]

"* * * it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to the rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law and not to the discretion of the President. * * *

"To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible. * * *"

An analysis of the cases and authorities dealing with this subject leads the staff to the conclusion that S. 2190, in its present form, will not accomplish the intent of its sponsors. Accordingly, it is recommended that, should the committee desire to take further action, the bill should be amended or redrafted, setting forth in detail those provisions of Executive Order 10290 which are consistent with the viewpoint of the Congress as well as any other standards or requirements which the committee may deem to be necessary.

ELI E. NOBLEMAN,
Professional Staff Member.

Approved:

WALTER L. REYNOLDS, *Staff Director.*

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[38] *Kendall* v. *United States*, 12 Peters 524, 610 (1838). See also authorities cited *supra*, notes 26, 27, and 28.

Appendix III. Authority for and Enforcement of Executive Order 10501

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
November 8, 1960.

To: House Government Operations Committee, Subcommittee on Government Information.
From: American Law Division.
Subject: Executive Order 10501 and publication of the "prestige reports" by nongovernmental people.

Reference is made to your inquiry of November 1, 1960, concerning criminal liability of a newspaper, under Executive Order 10501 (Safeguarding Official Information), for having published, during the recent political campaign for election of a President of the United States, certain "prestige reports" prepared and classified by USIA as "secret" or "confidential." The specific information you requested follows:

1. What is the statutory basis supporting Executive Order 10501?

The Executive order by its terms states (18 F.R. 7049):

"Now, Therefore, by virtue of the authority vested in me by the Constitution and Statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security it is hereby ordered as follows: * * *."

Such general language as this would seem to indicate that the President, in issuing the order, based his authority to do so on his general authority as President of the United States and not on any specific statute. Contrast this language with that in Executive Order 10887 dated September 23, 1960, which stated:

"By virtue of the authority vested in me by the Act of September 2, 1958, 72 Stat. 1703, as amended, hereinafter called the act and by the Public Buildings Act of 1959 (73 Stat. 479), and as President of the United States, it is ordered as follows: * * *."

During the 1st session of the 86th Congress the President issued 61 Executive orders, of which number, 16 were in terms generally similar to Executive Order 10501, 2 cited his general authority as Commander in Chief of the Armed Forces, and 43 cited specific statutes as the basis for his authority. (See U.S. Code Congressional and Administrative News, 86th Cong., 1st sess., vol. 1, pp. 1029–1130.) From this it would seem that if there had been a specific statutory basis for the order, the President would have specifically relied upon it in issuing the order.

Further, an extensive search fails to reveal any statute which specifically authorizes the President to issue such an order. From the foregoing it must then be assumed that the President issued Executive Order 10501 under an implied constitutional power. (See Constitution, art. II, sec. 1, vesting executive power in the President, art. II,

sec. 2, providing that the President shall be Commander in Chief of the Armed Forces, and art. II, sec. 3, requiring him to take care that the laws be faithfully executed.) The extent of the President's constitutional power to control the disclosure by persons in the executive branch of the Government and to withhold information from the Congress and the public has long been in controversy and has never been fully settled.

2. Does this Executive order control nongovernmental people?

3. What sanctions may be visited upon nongovernmental people who violate the order?

Executive Order 10501 in section 19 revokes Executive Order 10290, an order on the same subject, the authority for the issuance of which is stated in substantially the same terms as Executive Order 10501. In general, Executive Order 10290 performed the same functions as the present order. With respect to your questions, it would seem that the statement in Cross, "The People's Right To Know," Columbia University Press, 1953, pages 206–208, could be applied with equal validity to Executive Order 10501. Cross states:

"In the long line of instances of Presidential denials of and restrictions upon access to Federal records, Executive Order 10290, issued by President Truman on September 24, 1951, is one of the most recent and by far the most sweeping, dramatic, and provocative. It prescribes 'regulations establishing minimum standards for the classification, transmission, and handling, by departments and agencies of the executive branch, of official information which requires safeguarding in the interest of the security of the United States.'

"The wisdom and justice of this Executive order, as well as the stated need for its issuance, have been sharply challenged in the press, in Congress, and elsewhere. Its practical effect has not as yet been ascertained. In view of the discretion to withhold access to Federal records, already vested in the executive departments and the administrative agencies, and of the inherent nature of the factors involved, the effect of the order is probably not susceptible of determination or measurement.

"Whatever may be said of the other aspects of the order, its legal validity has scarcely been challenged. As the dearth of congressional enactments has left the field wide open for Executive occupation, it seems unlikely that its validity may be challenged successfully. Repeal or modification are other questions, of course, and one or more bills to that effect have been introduced. Unless and until Congress exercises its powers, the issue of legality is largely academic. For that reason the legal issue will not be examined here in detail. It is the subject of extensive examination in staff memorandum No. 82–1–60, dated November 29, 1951, of the Senate Committee on Expenditures in the Executive Departments, which deals with the source and validity of the order and the means by which it may be repealed, superseded or modified by congressional action.

"Because the order is far too long for textual coverage or for detailed analysis here (it is the subject of staff memorandum No. 82–1–59, dated November 14, 1951, of the above-mentioned Senate committee), its chief characteristics only are outlined.

"The general scope and stated purposes are as set forth above. The order is addressed to 'Heads of Executive Departments and

Agencies.' It authorizes them or their designated subordinates to asking, within specified categories, the 'classifications' to be given to any official information 'the safeguarding of which is necessary in the interest of national security, and which is classified for such purposes' by the heads of the originating agencies.

"The regulations prescribed by the order do not directly affect relations between the Government and private citizens and are not binding upon the general public. The regulations constitute in effect a mandate by the Chief Executive to his subordinates in their capacity as officers or employees of the Federal Government as to the manner in which they are to perform their duties and exercise their discretion.

"The order cites no specific constitutional or statutory authority for its issuance. It was issued 'by virtue of the authority vested in me by the Constitution and statutes *and as President* of the United States.' [Italic added.] There appears to be no statute expressly authorizing issuance. It must be assumed, therefore, that authority is based upon constitutional power, expressed or implied. No express power is to be found. Accordingly, the President's authority, if any, to issue the order must be spelled out by implication from one or more of his specifically granted powers or duties or, as a remote possibility, from some such 'inherent power,' independent of constitutional provision, as has been claimed to attach to the President as head of state in time of emergency. It seems likely that authority is claimed to stem from the Constitution, article II, section 1, which provides in part that 'executive Power shall be vested in a President,' and article II, section 3, which provides in part that 'he shall take Care that the Laws be faithfully executed.'

"These two provisions, plus Presidential power of appointment and removal of those to whom the order is addressed, appear to create a general power of direction over the executive branch of the Government sufficient to sustain the legality of the order. Such power, however, is neither exclusive nor unlimited. It appears clear that action taken by a President pursuant to this general power of direction must not conflict with congressional action which is constitutionally authorized. In the last analysis validity rests on the circumstance that, so far as action is concerned, Congress stands mute. Solution depends on legislation to transmute the problem from one of unrestrained grace or discretion to one of law. Legally the essence of the problem is legislative and political. Factually the problem is largely one of definition.

"In any case it is evident that there is a wide area of Federal Government business in which the right of the people to know is either nonexistent or nonenforcible, and in which public business cannot become the public's business whenever grace takes a holiday."

Since it would appear that no criminal sanctions are or could be imposed upon nongovernmental people by the terms of the Executive order itself, if any such sanctions exist they must be sought in the statutes. We have found no statutory authority directed specifically toward punishing those who violate this particular order. It is necessary, therefore, to determine whether violation of the order would constitute a violation of some general statute.

4. Has the New York Times violated any statute or Executive order in publishing the report about U.S. prestige?

Without having a complete picture of all the facts and circumstances surrounding the publication of the report, such as would be before a court at trial, it is not really possible to say whether the New York Times violated Executive Order 10501. But assuming that it did, no sanctions could be imposed upon it for this alone since the President, lacking legislative power, could not make a violation a criminal offense. Accordingly, the more significant question is whether such action may have been in violation of some criminal statute. The statute which seems closest in point is the Espionage Act. This act in section 24(a) (18 U.S.C. 798) provides:

"(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

* * * * * * *

"(3) concerning the communication intelligence activities of the United States or any foreign government; or

"(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

"Communication intelligence," however, is defined in subsection (b) of the section as: "The term 'communication intelligence' means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients; * * *."

Since the "prestige report," according to the newspapers, was a Gallup-poll type of report compiled abroad, pursuant to contract, from public speeches, newspapers, and so forth, at the instance of USIA, the report would not seem to fall within this definition.

The only other provision which might possibly be applicable would seem to be section 1(e) of the same statute (18 U.S.C. 793(e)) which provides:

"(c) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

* * * * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

In this connection, however, the following should be considered. The act deals with the disclosure of information but the information disclosed must be information "relating to the national defense." In *Gorin* v. *U.S.* (312 U.S. 19, 28), the Supreme Court said:

"Finally, we are of the view that the use of the words 'national defense' has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911.[1] The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the Armed Forces by civilians or the extension of the combat area. National defense, the Government maintains, 'is a generic concept of broad connotations, referring to the Military and Naval Establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning. Whether a document or report is covered by section 1(b) or 2(a) depends upon its relation to the national defense, as so defined, not upon its connection with places specified in section 1(a)."

The question of whether the prestige reports published by the Times newspaper are sufficiently related to the national defense so as to bring the publication within the act would be a question of fact to be determined by the jury. In *Gorin, supra,* the Court said (p. 32):

"The function of the Court is to instruct as to the kind of information which is violative of the statute, and of the jury to decide whether the information secured is of the defined kind. It is not the function of the Court, where reasonable men may differ, to determine whether the acts do or do not come within the ambit of the statute. The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined.[2]

The Court also stated (pp. 27–28):

"The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established." [3]

Since the prestige reports appear to be based on Gallup-poll type of information and were revealed in a political campaign it would seem hardly likely that a jury would convict even if the trial judge permitted the case to go to a jury.

FREEMAN W. SHARP,
Legislative Attorney.

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[1] 36 Stat. 1084: "That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States * * *."

[2] *Grand Trunk Ry. Co.* v. *Ives,* 144 U.S. 408, 417; *Gunning* v. *Cooley,* 281 U.S. 90, 94. Cf. *Dunlop* v. *United States,* 165 U.S. 486, 500–501.

[3] Cf. *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 501.

Appendix IV. Savings Estimated as a Result of Executive Order 10964

HOUSE OF REPRESENTATIVES,
SPECIAL GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
September 21, 1961.

STAFF MEMORANDUM

To: Congressman John E. Moss.
From: Samuel J. Archibald, Staff Administrator.
Subject: Savings estimated to result from Executive Order 10964 of September 20, 1961 (26 F.R. 8932), establishing a declassification system.

A careful survey of Federal agencies indicates that, in addition to removing major deficiencies in the system for controlling military-security information and to improving enforcement of classification regulations, Executive Order 10964 will result in substantial money savings. The increase in efficiency and economy resulting from the President's action on the recommendations of the House Government Operations Committee will amount, in this instance, to an estimated annual saving of $1 million.

The new Executive order adds Presidential authority to the system for declassifying "historical" Defense Department documents which was established in 1958. The Executive order also affects directly a large volume of classified material in the "civilian" agencies by removing unnecessary restrictions of the expensive security system. There are three separate categories where valid savings estimates can be made.

The new Executive order, although it is designed to affect current classified material, also will have a direct effect on security documents which now have only historical value. The provision for automatic declassification after 12 years of the great bulk of classified documents will affect tons of material stored in warehouses. The downgrading and eventual declassification of current material will mean a saving on the day-to-day handling of classified material. And deletion of the requirement for insulated safes to protect classified documents will mean another substantial saving.

STORAGE COST REDUCTION

The General Services Administration has estimated that there are some 40,000 cubic feet of non-Defense Department classified records in storage. And document experts estimate that the average cost of the protection measures called for in regulations on storing classified documents is $2 a cubic foot per year. The General Services Administration reports that the average cost of storing routine Government documents is only 80 cents a cubic foot per year. The great bulk of the 40,000 cubic feet of stored documents is affected by the

new provision for automatic declassification at the end of 12 years. These documents thus can be handled under the less expensive 80-cents-a-cubic-foot system, making possible an annual saving of as much as $48,000.

COSTS OF HANDLING CURRENT CLASSIFIED DOCUMENTS

There are no accurate figures on the volume of classified documents currently in use by Government agencies. Valid estimates range from a General Services Administration figure of 500,000 cubic feet of classified documents used by agencies other than the Defense Department to 850,000 cubic feet. The latter figure is based on an official estimate that there are 8,500,000 cubic feet of all types of documents in current use by all non-Defense agencies. In 1956–57 the Commission on Government Security surveyed all agencies, and the average non-Defense agency reported that about 10 percent of its documents were classified.

The Defense Department reports that the cost of handling classified material in current use is about $11 a cubic foot each year. The GSA reports the cost of handling routine Government documents is only $5.30 a cubic foot per year. The new security system will not, of course, mean that all of the classified documents will immediately go from the "top secret" and "secret" categories which require expensive handling to the less expensive "confidential" category or the inexpensive declassified category. But over a 12-year period the great volume of these classified documents will be downgraded. If only one-fourth of the documents move from "top secret" and "secret" to "confidential" or unclassified—using even the lower estimate of 500,000 cubic feet of documents affected and a reduction in handling costs of $5.70 a cubic foot—an annual saving of $712,500 is possible.

SAFE SAVINGS

When Executive Order 10501 was signed in 1953, a large number of fireproof filing cabinets with combination locks had to be purchased to comply with provisions of the order for the protection of military security information. As classified documents began piling up at an alarming rate, more safe-type filing cabinets were purchased. In the last 6 years the Federal Government has bought some 31,000 of the filing cabinets at a cost of about $540 apiece. The less complicated noninsulated security filing cabinets which are permitted under the new order cost about $380.

Government furniture buyers estimate that the fireproof security filing cabinets now in use will last a little over 25 years. They will deteriorate because of use, damage and, particularly, due to moisture forming in the airtight drawers. Replacing the safes within the 25-year period will cost $11,780,000 when noninsulated security filing cabinets are purchased, but the replacement cost would have been $16,740,000 had not President Kennedy removed the fireproof provision.

This saving of $4,960,000, spread over the approximately 20 years left since the great majority of the safes were purchased, means an annual saving of $248,000 a year.

TOTAL ESTIMATED SAVINGS

An annual saving of $48,000 is possible because of improvements in the handling of classified documents in storage. There should be at least $712,500 saved in the new system for handling classified material in current use. And there will be $248,000 saved each year in the purchase of security filing cabinets. The total estimated saving is thus $1,008,500.

Appendix V. The Espionage Act

EXCERPTS FROM TITLE 18, UNITED STATES CODE

§ 793. Gathering, transmitting, or losing defense information.

(a) Whoever, for the purpose of obtaining information respecting the national devense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the nati-nal

defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

§ 794. Gathering or delivering defense information to aid foreign government.

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating

to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

§ 795. Photographing and sketching defense installations.

(a) Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation of such vital military and naval installations or equipment without first obtaining permission of the commanding officer of the military or naval post, camp, or station, or naval vessels, military and naval aircraft, and any separate military or naval command concerned, or higher authority, and promptly submitting the product obtained to such commanding officer or higher authority for censorship or such other action as he may deem necessary.

(b) Whoever violates this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 796. Use of aircraft for photographing defense installations.

Whoever uses or permits the use of an aircraft or any contrivance used, or designed for navigation or flight in the air, for the purpose of making a photograph, sketch, picture, drawing, map, or graphical representation of vital military or naval installations or equipment, in violation of section 795 of this title, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 797. Publication and sale of photographs of defense installations.

On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the

proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 798. Disclosure of Classified Information.[1]

(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

(3) concerning the communication intelligence activities of the United States or any foreign government; or

(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) As used in subsection (a) of this section—

The term "classified information" means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms "code," "cipher," and "cryptographic system" include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term "foreign government" includes in its meaning any person or persons acting or purporting to act for or on behalf of any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country, whether or not such government is recognized by the United States;

The term "communication intelligence" means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term "unauthorized person" means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States.

(c) Nothing in this section shall prohibit the furnishing, upon lawful demand, of information to any regularly constituted committee of the Senate or House of Representatives of the United States of America, or joint committee thereof.

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[1] So enacted. See second section 798 enacted on June 30, 1953, set out below.

§ 798. Temporary extension of section 794.[2]

The provisions of section 794 of this title, as amended and extended by section 1(a)(29) of the Emergency Powers Continuation Act (66 Stat. 333), as further amended by Public Law 12, Eighty-third Congress, in addition to coming into full force and effect in time of war shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2912, 3 C.F.R., 1950 Supp., p. 71), or such earlier date as may be prescribed by concurrent resolution of the Congress, and acts which would give rise to legal consequences and penalties under section 794 when performed during a state of war shall give rise to the same legal consequences and penalties when they are performed during the period above provided for.

[2] So enacted. See first section 798 enacted on Oct. 31, 1951, set out above.

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